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FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Sep 28, 2023

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JESSIKA F.,

-vs-

Plaintiff,

KILOLO KIJAKAZI, Acting
Commissioner of Social Security

Defendant.

No. 4:22-CV-5127-WFN

ORDER

Jessika F. [Plaintiff] brings this action seeking judicial review of the Commissioner of Social Security's final decision denying her application for disability benefits. ECF No. 1. Attorney Chad Hatfield represents Plaintiff. Special Assistant United States Attorney Jeffrey E. Staples represents the Commissioner [Defendant]. After reviewing the administrative record and the briefs filed by the parties, the Court **AFFIRMS** the Commissioner's final decision.

JURISDICTION

Plaintiff applied for Supplemental Security Income on October 29, 2018, alleging disability beginning on July 19, 2018. Tr. 204–08. The application was denied initially, Tr. 51–57, and on reconsideration, Tr. 58–66. Administrative Law Judge [ALJ] Lori Freund held a hearing on June 3, 2021, Tr. 33–50, and issued an unfavorable decision on August 6, 2021, Tr. 16–24. The Appeals Council denied review on August 11, 2022. Tr. 1–6. The ALJ's August 2021 decision became the Commissioner's final decision, which is appealable to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review on October 14, 2022. ECF No. 1.

FACTS

Plaintiff was born in 1997 and was 20 years of age as of her alleged onset date. Tr. 23, 204. She has a high school education and minimal work history. Tr. 23, 41–44. Plaintiff alleges disability based on injuries to her leg caused by a motor vehicle collision. Tr. 296-97.

STANDARD OF REVIEW

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir.1995). The Court reviews the ALJ's legal conclusions *de novo* but gives deference to a reasonable interpretation of a statute the agency is charged with administering. See *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000). The ALJ's decision will be reversed only if it is not supported by substantial evidence or if it is based on legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097–98 (9th Cir. 1999). Substantial evidence is more than a scintilla, but less than a preponderance. *Id.* at 1098. Put another way, "[i]t means such relevant evidence as a reasonable mind might assess as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). If the evidence is susceptible to more than one rational interpretation, the Court may not substitute its judgment for the ALJ's. *Tackett*, 180 F.3d at 1097–98; *Morgan v. Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999). The ALJ's decision is conclusive if it is supported by substantial evidence, even if conflicting evidence supports a finding of either disability or non-disability. *Sprague v. Bowen*, 812 F.2d 1226, 1229–30 (9th Cir. 1987). But a decision supported by substantial evidence will still be set aside if it is based on legal error. *Brawner v. Sec'y of Health & Hum. Servs.*, 839 F.2d 432, 433 (9th Cir. 1988).

SEQUENTIAL EVALUATION PROCESS

The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a), 416.920(a); *Bowen v. Yuckert*, 482 U.S. 137, 140–42 (1987). In steps one through four the claimant bears the burden of establishing disability. *Tackett*, 180 F.3d at 1098–99. This burden is met once a

1 claimant establishes that a physical or mental impairment prevents her from engaging in past
 2 relevant work. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). If a claimant cannot perform
 3 past relevant work, the ALJ proceeds to step five, and the burden shifts to the Commissioner
 4 to show (1) the claimant can make an adjustment to other work; and (2) the claimant
 5 can perform specific jobs that exist in the national economy. *Batson v. Comm'r of Soc.*
 6 *Sec. Admin.*, 359 F.3d 1190, 1193–94 (9th Cir. 2004). If a claimant cannot make an
 7 adjustment to other work in the national economy, she will be found disabled. 20 C.F.R.
 8 §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

9 ADMINISTRATIVE DECISION

10 On August 6, 2021, the ALJ issued a decision finding Plaintiff was not disabled as
 11 defined in the Social Security Act. Tr. 16–24.

12 At step one, the ALJ found Plaintiff had not engaged in substantial gainful activity
 13 since the alleged onset date. Tr. 18.

14 At step two, the ALJ determined Plaintiff had the following severe impairments:
 15 "right femur fracture, status post[-]surgery; right tibia fibula fracture, status post[-]surgery;
 16 left fibula fracture, status post[-]surgery; and[] morbid obesity." Tr. 19.

17 At step three, the ALJ found Plaintiff did not have an impairment or combination of
 18 impairments that met or medically equaled the severity of one of the listed impairments.
 19 Tr. 19–20.

20 The ALJ assessed Plaintiff's Residual Functional Capacity [RFC] and found she can
 21 perform light work

22 except lift/carry 20 pounds occasionally, 10 pounds frequently; stand and walk 2
 23 hours in an 8 hour workday; sit 6 hours in an 8 hour workday; never climb ladders,
 24 ropes or scaffolds; never kneel, crouch or crawl; occasionally use foot controls,
 25 bilaterally; occasionally climb ramps and stairs with handrail; occasionally stoop;
 26 avoid all exposure to unprotected height, hazards, hazardous machinery,
 27 excessive vibration and the operative control of moving machinery (other than the
 28 automobile) and avoid moderate exposure to excessive heat.

1 Tr. 20.

2 At step four, the ALJ found Plaintiff has no past relevant work. Tr. 23.

3 At step five, the ALJ found, based on the vocational expert's testimony, and
 4 considering Plaintiff's age, education, work experience, and RFC, there were jobs that
 5 existed in significant numbers in the national economy that Plaintiff could perform. Tr. 23–
 6 24. The ALJ specifically identified the representative occupations of agricultural sorter,
 7 small parts assembler, and electrical accessory assembler. Tr. 24.

8 The ALJ thus concluded Plaintiff was not under a disability within the meaning of the
 9 Social Security Act at any time from the application date. *Id.*

10 ISSUES

11 The question presented is whether substantial evidence supports the ALJ's decision
 12 denying benefits and, if so, whether the decision is based on proper legal standards.

13 Plaintiff contends the ALJ erred by (1) improperly evaluating the medical opinion
 14 evidence, (2) failing to conduct an adequate step three inquiry, (3) rejecting Plaintiff's
 15 subjective complaints, (4) rejecting lay witness testimony, and (5) failing to conduct an
 16 adequate step five inquiry. ECF No. 12 at 4–5.

17 DISCUSSION

18 (1) Medical Opinion Evidence

19 Plaintiff alleges the ALJ erred by improperly evaluating the opinion of Jessica Luther,
 20 A.R.N.P. ECF No. 12 at 7–11.

21 The ALJ considers the persuasiveness of each medical opinion and prior
 22 administrative medical finding, regardless of whether the medical source is an Acceptable
 23 Medical Source. 20 C.F.R. § 404.1520c(c). The ALJ is required to consider multiple
 24 factors, including supportability, consistency, the source's relationship with the
 25 claimant, any specialization of the source, and other factors, such as the source's familiarity
 26 with other evidence in the file or an understanding of Social Security's disability
 27 program. *Id.* The regulations make clear that the supportability and consistency of
 28 the opinion are the most important factors, and the ALJ must articulate how she

1 considered those factors in determining the persuasiveness of each medical opinion or prior
 2 administrative medical finding. 20 C.F.R. § 404.1520c(b). The ALJ may explain how
 3 she considered the other factors, but is not required to do so, except in cases where
 4 two or more opinions are equally well-supported and consistent with the record.

5 *Id.*

6 Supportability and consistency are further explained in the regulations:

7 (1) *Supportability*. The more relevant the objective medical evidence and
 8 supporting explanations presented by a medical source are to support his or her
 9 medical opinion[s] or prior administrative medical finding[s], the more
 10 persuasive the medical opinions or prior administrative medical finding[s] will
 11 be.

12 (2) *Consistency*. The more consistent a medical opinion[s] or prior
 13 administrative medical finding[s] is with the evidence from other medical
 14 sources and nonmedical sources in the claim, the more persuasive the medical
 15 opinion[s] or prior administrative medical finding[s] will be.

16 20 C.F.R. § 404.1520c(c).

17 The Ninth Circuit has additionally held that the new regulatory framework displaces
 18 the longstanding case law requiring an ALJ to provide "specific and legitimate" or "clear
 19 and convincing" reasons for rejecting a treating or examining doctor's opinion. *Woods v.*
 20 *Kijakazi*, 32 F.4th 785, 787, 792 (9th Cir. 2022). "Now, an ALJ's decision, including the
 21 decision to discredit any medical opinion, must simply be supported by substantial
 22 evidence." *Id.* at 787.

23 Ms. Luther completed a form on August 27, 2020. Tr. 584–86. She opined, among
 24 other things, that Plaintiff would be limited to sedentary work, would need to elevate her
 25 legs for one to two hours a day, would be off task for up to thirty percent of the workweek,
 26 and would miss four or more days of work per month. *Id.* The ALJ found Ms. Luther's
 27 opinion was supported by evidence that Plaintiff had pain and swelling and needed to elevate
 28 her legs the first months after the injuries, but inconsistent with Plaintiff's improvement over

1 time. Tr. 22. The ALJ noted specifically that Plaintiff's swelling, pain, and need to elevate
 2 her legs had all decreased since her injuries and surgeries. *Id.* Because Ms. Luther's opinion
 3 was inconsistent with Plaintiff's improvement, the ALJ concluded it was only partially
 4 persuasive. *Id.*

5 Plaintiff argues the ALJ erred by "provid[ing] no citations, explanation, or timeframe
 6 for when or how [Plaintiff] supposedly improved." ECF No. 12 at 9. But the ALJ cited
 7 records from August 2020 showing Plaintiff's impairments had been improving. Tr. 22, 597–
 8 98. Plaintiff also argues there is evidence in the record that supports Ms. Luther's opinion.
 9 ECF No. 12 at 9–10. There is evidence that supports Ms. Luther's opinion. The ALJ found
 10 as much herself. Tr. 22. However, the ALJ also found that Ms. Luther's opinion was
 11 inconsistent with evidence of Plaintiff's improvement. *Id.* This was an appropriate reason
 12 for discounting Ms. Luther's opinion. See 20 C.F.R. § 404.1520c(c)(1). Because the ALJ's
 13 finding is supported by substantial evidence, the Court must uphold it even if there is also
 14 evidence that could support another conclusion. See *Morgan*, 169 F.3d at 599. Plaintiff
 15 argues too that the ALJ erred by giving more weight to the opinion of Robert Thompson,
 16 M.D., because Dr. Thompson did not review Plaintiff's subjective claims and "the ALJ must
 17 consider the claimant's subjective pain complaints." ECF No. 12 at 10–11. However, the
 18 ALJ did consider Plaintiff's subjective pain complaints and found they were not entirely
 19 consistent with the evidence in the record. Tr. 20–22. The ALJ was not required to give more
 20 weight to Ms. Luther's opinion than Dr. Thompson's.

21 (2) Step Three

22 Plaintiff argues "the ALJ erred [at step three] by failing to conduct any analysis in
 23 simply stating the elements of Listing 1.18 and concluding without explanation or citation
 24 that [Plaintiff] did not meet or equal the Listing criteria." ECF No. 12 at 12.

25 At step three the ALJ must determine whether the claimant's impairments meet or
 26 equal an impairment listed in 20 C.F.R. pt. 404, Subpt. P, app. 1. 20 C.F.R. § 416.925(d). If
 27 the claimant's impairments do meet or equal a listing, the claimant will be found disabled
 28 without further inquiry. 20 C.F.R. § 416.9250(a)(4)(iii); *Kennedy v. Colvin*, 738 F.3d 1172,

1 1176 (9th Cir. 2013). This is so because the listed impairments are a higher level of severity
 2 than the statutory standard. *See Kennedy*, 738 F.3d at 1176; *Sullivan v. Zebley*, 493 U.S. 521,
 3 532 (1990). To show reversible error at step three, the claimant must show evidence that
 4 would support a finding tthe claimant met the requirements of the listing. *See Burch v.*
 5 *Barnhart*, 400 F.3d 676, 683 (9th Cir. 2005).

6 Here, the ALJ explained her reasoning plainly, "The medical record is void of
 7 evidence showing" the several requirements of Listing 1.18. Tr. 19–20. Listing 1.18
 8 requires: chronic joint pain or stiffness; abnormal motion, instability, or immobility of the
 9 affected joint; anatomical abnormality of the affected joint noted on a physical examination
 10 or imaging; *and* medical documentation of the need for a walker, bilateral canes or crutches,
 11 a wheeled and seated mobility device that requires both hands; or the inability to use one
 12 upper extremity to independently initiate, sustain, and complete work-related activities; or
 13 the inability to use both upper extremities such that neither can be used to independently
 14 initiate, sustain, and complete work-related activities involving fine and gross movements.
 15 20 C.F.R. Part 404, Subpart P, Appendix 1, § 1.18. Plaintiff says that she "arguably meets
 16 or equals Listing 1.18" because she had ankle fractures and a knee surgery, temporarily
 17 needed a walker, and has a surgical scar. ECF No. 12 at 12–13. This is not enough to
 18 establish reversible error. *See Burch*, 400 F.3d at 683.

19 (3) Plaintiff's Subjective Symptom Testimony

20 Plaintiff contends the ALJ erred by rejecting her subjective symptom testimony. ECF
 21 No. 12 at 13–17.

22 It is the province of the ALJ to make determinations regarding a claimant's subjective
 23 complaints. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). However, the ALJ's
 24 findings must be supported by specific, cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229,
 25 1231 (9th Cir. 1990). Once the claimant produces medical evidence of an underlying
 26 medical impairment, the ALJ may not discredit testimony as to the severity of an impairment
 27 merely because it is unsupported by medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722
 28 (9th Cir. 1998). Absent affirmative evidence of malingering, the ALJ's reasons for rejecting

1 the claimant's testimony must be "specific, clear and convincing." *Smolen*, 80 F.3d at 1281;
 2 *see also Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996). "General findings are
 3 insufficient: rather the ALJ must identify what testimony is not credible and what evidence
 4 undermines the claimant's complaints." *Lester*, 81 F.3d at 834; *see also Dodrill v. Shalala*,
 5 12 F.3d 915, 918 (9th Cir. 1993).

6 Plaintiff did not testify at the hearing. Tr. 33–50. She completed a function report.
 7 Tr. 240–47. In that report, Plaintiff wrote that she could not "stand for long periods,"
 8 "drive [her]self to work," "lift items," or "walk far distances." Tr. 240. She also wrote
 9 that the need to attend physical therapy three days a week limited her ability to work.
 10 *Id.*

11 The ALJ found Plaintiff's medically determinable impairments could reasonably be
 12 expected to cause the alleged symptoms; however, she found Plaintiff's statements
 13 concerning the intensity, persistence and limiting effects of his symptoms were not entirely
 14 consistent with the medical evidence and other evidence in the record. Tr. 20–22.
 15 Specifically, the ALJ found Plaintiff's statements were not substantiated by the record and
 16 inconsistent with evidence that Plaintiff's condition had improved. *Id.*

17 Plaintiff argues the ALJ erred by discounting Plaintiff's subjective claims only
 18 because they were unsupported by objective evidence. ECF No. 12 at 14. However, the ALJ
 19 discounted Plaintiff's claims not only because they were unsupported by the record, but also
 20 because Plaintiff's symptoms improved. Tr. 20–22. These are legitimate reasons for rejecting
 21 Plaintiff's symptom claims. *See Wellington v. Berryhill*, 878 F.3d 867, 876 (9th Cir. 2017).
 22 The ALJ's decision is supported by substantial evidence. Tr. 597–98. Plaintiff claims "the
 23 ALJ's evaluation mischaracterized the" evidence, ECF No. 12 at 15, but the Court disagrees.
 24 The ALJ's interpretation of the evidence must be affirmed because it is reasonable. *See*
 25 *Tackett*, 180 F.3d at 1097–98; *Jamerson v. Chater*, 112 F.3d 1064, 1067 (9th Cir. 1997).

26 (4) Lay Opinion

27 Plaintiff's fiancé and mother both wrote letters in support of Plaintiff's claim. Tr.
 28 293-4. Plaintiff argues "[t]he ALJ erred by failing to address these lay statements," ECF

1 No. 12 at 17, but the ALJ "consider[ed] the entire record," Tr. 18, and was not required to
2 articulate her consideration of nonmedical sources, *see* 20 C.F.R. § 416.920c.

3 **CONCLUSION**

4 Having reviewed the record and the ALJ's findings, the Court finds the ALJ's decision
5 is supported by substantial evidence and free of error. The Court has reviewed the briefs and
6 the file and is fully informed Accordingly,

7 **IT IS ORDERED** that:

- 8 1. Plaintiff's Brief, filed April 18, 2023, **ECF No. 12**, is **DENIED**.
9 2. Defendant's Brief, filed May 17, 2023, **ECF No. 14**, is **GRANTED**.

10 The District Court Executive is directed to file this Order and provide copies to
11 counsel. **Judgment shall be entered for Defendant** and the file shall be **CLOSED**.

12 **DATED** this 28th day of September, 2023.

13
14 08-25-23



15 WM. FREMMING NIELSEN
16 SENIOR UNITED STATES DISTRICT JUDGE

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